

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD C. FLEMING,

Defendant-Appellant.

UNPUBLISHED

July 17, 2003

No. 239684

Wayne Circuit Court

LC No. 01-000917-01

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of three counts of first-degree premeditated murder, MCL 750.316(1)(a), three counts of felony murder, MCL 750.316(1)(b), one count of first-degree criminal sexual conduct (CSC 1), MCL 750.520b, and possession of a firearm during the commission of a felony, MCL 750.227b. The felony-murder convictions were vacated by the trial court, and defendant was sentenced to life in prison without the possibility of parole on the first-degree premeditated murder convictions, eighty-five months to fifty years' imprisonment on the CSC 1 conviction, and two years' imprisonment on the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. BASIC FACTS

The convictions arose from the sexual assault of defendant's former girlfriend, and the shooting deaths of the girlfriend's mother and twin brothers. Overwhelming evidence presented at trial showed that defendant sexually assaulted his ex-girlfriend in her home, and then waited for the other victims to return to the home, at which point he shot them to death.

The sexual assault was particularly brutal and the victim was bound during the ordeal. Throughout the assault, defendant told the victim that he was going to kill her family. Having finished the assault, and hearing a doorknob click indicating the return of the ex-girlfriend's family, defendant told the victim: "It's killing time."

Although she testified differently at trial, defendant's mother, in a statement to police, identified the gun used in the crimes as one that she kept in her home at one time. The statement further indicated that defendant had access to his mother's home, that the gun had been loaded,

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

that the gun was not in the home at the time of the crime, and that defendant told her that he had taken the gun and would return it. Defendant gave a statement to police indicating that he had consensual sex with his former girlfriend, and he then hit her in the mouth and tied her up after an argument ensued over her new boyfriend. According to the statement, defendant heard his ex-girlfriend's family return, and he then proceeded to beat the mother and one of the brothers with a pipe and then shot them because the brother would not stop coming after defendant. Autopsy results confirmed that those two victims suffered blunt force trauma to the head, along with gunshot wounds. When the other brother came upon the scene, defendant shot him. Defendant acknowledged that none of the victims had weapons. Defendant told police that he did not have time to kill his ex-girlfriend, and that he left the home after deciding not to steal the family car because a neighbor came by, which made him nervous.

The neighbor's testimony, identifying defendant as being at the scene and fleeing, along with police testimony, further supported the prosecutor's case.

II. APPELLATE ISSUES – OVERVIEW

On appeal, defendant raises two issues. First, defendant argues that he was denied his Sixth Amendment rights when the trial court excluded defendant from the courtroom during the trial. Second, defendant argues that the trial court abused its discretion when it denied his motion for a mistrial after defendant's non-volitional outbursts during trial prejudiced the jury against him. We now proceed to detail the events at trial with respect to defendant's outbursts.

III. DEFENDANT'S ACTIONS IN COURT

After jury selection was completed, initial instructions read, and opening statements made, the prosecutor called the first witness, the victim of the sexual assault. Before the witness was even able to state her name, the following transpired:

Defendant: You, you did this shit to me.

Judge: Hey.

Defendant: You did this shit to me. Why did you do this to me?

Judge: Sit down.

Officer: Sit down. Sit down.

Defendant: Why did you do this to me?

Judge: Sit down.

Defendant: It was you and him. It was you and him. You and him did this to me. You and him did this to me. Y'all did this shit to me.

Judge: Ladies and gentlemen of the jury, I'm going to send you back to the jury room. I'm going to ask you all to rise, please.

Defendant: You and him did this to me.

Judge: All rise.

Officer: Sit down.

Defendant: You and him did this to me. Get her ass away from me. Get her away from me. Get her away from me. Get away from me know. Get away from me.

Judge: Go back to the jury room, ladies and gentlemen.

The trial court then admonished defendant and told him that he would have to control himself; no more outbursts would be allowed. Defense counsel then raised the issue of defendant's competency, and counsel requested that defendant be examined. Defense counsel also requested that a mistrial be declared because defendant's outburst had prejudiced the jury against his client. During the mistrial request, the record indicates that defendant stated that he could not breathe. Defendant's mother was permitted to talk to him in an attempt to settle him down, and defendant was then escorted out of the courtroom. The attorneys met in chambers, and afterward, the jury was discharged for the day and told to disregard what they had just heard and observed. The trial court indicated that it would decide the following day whether to grant a mistrial, noting that defendant would be attended to by doctors in the meantime.

The following day, a hearing was held regarding defendant's physical health and competency. Evidence was presented that after defendant was escorted out of the courtroom the previous day, his blood pressure was checked and was high, and his pulse was elevated but then returned to normal. A doctor, who did not personally examine defendant, testified that defendant may have suffered from an anxiety attack or hyperventilation based on the description of what occurred in court and the doctor's discussion with a treating nurse. A medical report, based on another doctor's personal examination of defendant, was admitted, and the diagnosis was panic attack, hyperventilation, and tension headache. The report indicated that defendant complained of numbness in his face and hands and a headache, but the diagnosis did not suggest any significant physical problems. A psychologist, who observed and tested defendant for two hours, opined that defendant was intentionally not cooperating, was malingering with respect to his alleged illness or problems in court, and that he was able to proceed with trial. The psychologist acknowledged, however, that anxiety was present. On cross-examination, defense counsel asked the psychologist whether he was aware that defendant had been diagnosed with fetal alcohol syndrome and that schizophrenia ran in the family, to which the psychologist replied in the negative; however, he testified that this would not change his opinion even if true. The psychologist recommended that a jail psychiatrist prescribe medication for defendant's anxiety. The trial court found defendant competent to stand trial, and it denied defendant's request for an independent psychiatric examination.

After the competency hearing, the parties presented their respective arguments on the motion for mistrial with defense counsel arguing that because the prosecutor intended to show at trial that defendant "snapped" when the killings occurred, the jury's observation of defendant "snapping" when the assault victim took the stand would fortify the prosecutor's position, thereby prejudicing defendant. The trial court denied the motion, finding that defendant's

actions were intentional and that he would not be denied a fair trial if the proceedings were continued. The trial court, after reviewing the statements made by defendant in front of the jury the previous day, concluded that the statements could be considered exculpatory. The court again warned defendant that any more outbursts would not be tolerated, and that if defendant did so, he would be gagged or removed.

The jury was brought into the courtroom. However, the jury quickly returned to the jury room after the prosecutor called the sexual assault victim to the stand and after a side-bar discussion had been held. Defendant then began complaining and hollering about a headache and demanding that he be taken to a doctor. The record appears to indicate that the court officer was required to physically subdue and restrain defendant. The transcript reflects that someone in the courtroom attempted to calm defendant by telling him to relax and settle down; apparently this individual was defendant's mother. Defendant continued ranting about a headache, wanting a doctor, and claiming that the pills given to him were not helping. Defendant ignored the trial court's repeated requests that he behave himself and discontinue his disruptive conduct. Finally, a court officer escorted defendant from the courtroom, telling defendant that he would receive some help.

The trial court concluded that it could not conduct an orderly trial with defendant in the courtroom. The court told defense counsel that he could have all the time he wanted to confer with defendant after the prosecutor's direct examination of a witness. The trial court stated that it would give defendant another opportunity to be present in the courtroom the next morning. Defense counsel declined the court's offer to instruct or address the jury regarding defendant's absence. With defendant removed from the courtroom, the sexual assault victim's testimony was taken throughout the remainder of the day.

The following day, before the jury was brought in, defendant appeared in the courtroom and promptly began to complain about a headache, asking for a doctor and a chance to lay down. The record reflects, based on statements by the trial court, that defendant was breathing heavily. The trial court, speaking to defendant, stated that defendant had not complained at all about needing help or having a headache until the first witness, the assault victim, was brought into the courtroom. The court noted its belief that defendant's breathing "problems" were self-induced and that his actions were intentional. The trial court also noted that defendant had been seen by doctors. The court asked defendant if he would behave once the jury was brought into the courtroom, and defendant continued to request a doctor. Defendant again stated that he did not feel good, and he asked if he could go lay down. The trial court demanded that defendant behave himself, and the jury entered the courtroom. However, defendant continued asking for permission to lay down, and as soon as the sexual assault victim was called to the stand, defendant stated: "Oh, hell naw. Naw, naw, naw. Get me away from her. Get me away from her. Get me away from her --." The trial court promptly had the jury return to the jury room.

The trial court again decided to proceed without defendant being present in the courtroom. Through testimony by a court officer, it was established that defendant was placed in lock-up with a speaker located nearby over which defendant could hear all of the trial proceedings. The trial court instructed its clerk to check the lock-up every twenty minutes to make sure the sound system was still operating properly. Additionally, because the sound system had not been set up the day before, tape recordings of the assault victim's testimony were

played for defendant. With defendant once again removed from the courtroom, the trial proceeded with the assault victim's testimony.

On the next day of trial, defendant was brought into the courtroom, and the trial court asked defendant if he would behave. Defendant shook his head indicating no, and he requested that he be allowed to lay down in the lock-up. Defendant was then escorted to the lock-up.

On the final day of trial, the court officer testified that he asked defendant if he was ready to come into the courtroom and behave; however, defendant indicated that he would not behave. The trial continued with defendant being able to listen to the proceedings over the sound system.

The trial court verified throughout the trial, through clerk and court officer testimony, that defendant was in a position to hear the trial testimony and that the sound system was working properly.

IV. ANALYSIS and HOLDING

A. Defendant's Right to be Present in the Courtroom

Defendant argues that his conduct did not rise to the requisite level of egregious behavior required to exclude him from trial. Defendant maintains that he was simply asking for medical help, and he was never threatening or disrespectful. Moreover, he claims that his outbursts were not voluntary and beyond his control, and stemmed from anxiety attacks or hyperventilation, yet the court would not allow defendant to take steps to address the problems. Defendant further argues that he never waived his right to be present. Accordingly, defendant concludes that his convictions should be reversed and a new trial granted. We disagree.

A defendant has the right to be present in the courtroom during every stage of trial pursuant to the Confrontation Clause of the Sixth Amendment to the United States Constitution, which is made applicable in state prosecutions through the Due Process Clause of the Fourteenth Amendment. *Illinois v Allen*, 397 US 337, 338; 90 S Ct 1057; 25 L Ed 2d 353 (1970); see also *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). This right is also established by statute, MCL 768.3, which provides that “[n]o person indicted for a felony shall be tried unless personally present during the trial[.]” “When a defendant is physically removed from the courtroom during trial, he is not personally present as required by MCL 768.3.” *People v Krueger*, 466 Mich 50, 53-54; 643 NW2d 223 (2002). A defendant's statutory right to be present during trial is not absolute and is subject to waiver, *id.* at 53, as is defendant's constitutional right to be present, *People v Gross*, 118 Mich App 161, 164; 324 NW2d 557 (1982), citing *Allen*, *supra*.

A defendant's voluntary absence from the courtroom during trial waives his right to present and does not preclude the trial judge from proceeding with the trial to conclusion. *People v Swan*, 394 Mich 451, 452; 231 NW2d 651 (1975). A defendant also waives his right to be present in the courtroom during trial if he engages in improper and disruptive behavior in the courtroom. *Gross*, *supra* at 164. With respect to disruptive behavior by a defendant, the United States Supreme Court in *Allen* ruled:

[W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. [*Allen, supra* at 343.]

Faced with a disruptive situation, a trial court can bind and gag a defendant, cite the defendant for contempt, or take the defendant out of the courtroom until he promises to conduct himself properly. *Id.* at 343-344.

A trial court's decision to remove a defendant from the courtroom during the defendant's trial is reviewed by this Court for an abuse of discretion. See *People v Reginald Harris*, 80 Mich App 228, 230; 263 NW2d 40 (1977). A constitutional issue presents a question of law that is reviewed de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

The trial court did not abuse its discretion in excluding defendant from the courtroom. It is quite evident from the record that defendant's repeated outbursts were and would be disruptive to the testimony of the sexual assault victim; she simply could not testify with defendant's continual interruptions. Defendant's behavior did not allow for the orderly function of a trial. Although defendant asked for medical assistance and displayed anxiety at times, it coincided with attempts to place the assault victim on the stand. The trial court did not believe defendant's claims of ill health, and we see nothing in the record that would cause us to second guess the court's conclusion, especially considering the court's superior position in determining defendant's credibility. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000).

The trial court gave defendant the opportunity to modify his behavior without success. The court provided speakers and tape recordings so that defendant could hear what occurred in the courtroom, and defense counsel was able to confer with defendant before cross-examination of a witness. Moreover, defendant subsequently expressed a desire not to be in the courtroom; therefore, a waiver occurred at that point in time. With respect to defendant's argument that his actions were non-volitional because of anxiety attacks and hyperventilation, we find the argument lacks merit. Defendant's statements, directly referencing the assault victim and containing expletives, were volitional and not part of an anxiety attack or hyperventilation. There was no abuse of discretion.

B. Motion for Mistrial

Defendant argues that the trial court erred in denying defendant's motion for mistrial after defendant's non-volitional outbursts prejudiced the jury against him and made it impossible for him to have a fair trial. We disagree.

A trial court's decision to grant or deny a motion for mistrial is reviewed for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* at 514. The power to declare a mistrial is to be used

with the greatest of caution and only under urgent circumstances and for very plain and obvious reasons. *People v Siler*, 171 Mich App 246, 256; 429 NW2d 865 (1988). The *Siler* panel further stated:

Defendant himself created the debacle at his trial. We find that the trial court was correct in denying defense counsel's motions for a mistrial and instructing the jury to disregard defendant's actions. We will not condone or allow a defendant to perpetrate chaos at his own trial and then obtain a mistrial on the basis of prejudice. We hold that the trial court did not abuse its discretion in denying defendant's motions for mistrial. [*Id.* at 256-257.]

Here, it was defendant's own actions which gave rise to the mistrial motion, and under *Siler*, this cannot form the basis for a mistrial. Defendant seeks to skirt the rule in *Siler* by arguing that his actions were not volitional and were caused by an anxiety attack and hyperventilation. Although this might explain defendant's breathing problems, we fail to see, as noted earlier, how the statements concerning the assault victim were part of an anxiety attack or hyperventilation. Further, as we have repeatedly stated, the court was in a superior position to evaluate and assess the true nature of defendant's physical state and his credibility.

Moreover, we find that defendant was not denied a fair trial, despite the outbursts, where the statements made by defendant did not directly inculcate him and could be viewed as placing the blame on others for the crime, thus, being exculpatory. In light of the nature of defendant's outbursts and the trial court's accommodations that allowed defendant to hear the entire proceedings, we cannot say that this case presents an urgent circumstance in which to invoke a mistrial or that defendant was denied a fair trial. The trial court did not abuse its discretion in denying defendant's motion for mistrial.

Affirmed.

/s/ William B. Murphy
/s/ Jessica R. Cooper
/s/ Charles L. Levin